IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

FRIDAY, THE 8TH JUNE 2007 / 18TH JYAISHTA 1929

WP(C).No. 16969 of 2007(T)

{IN I.A.NO.2269/2006 IN C.M.A.NO.58/2006 OF THE II ADDL. DISTRICT COURT, TRIVANDRUM IN O.S.NO.1130/2000 OF THE I ADDITIONAL MUNSIFF'S COURT, TRIVANDRUM(I.A.NO.1608/2004)

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PETITIONERS:

1. BABY, D/O.LATE APPUKUTTAN NADAR, AGED 52 YEARS, RESIDING AT S.R.A.104, KOOTHU ROAD, KARIMKULAM, VATTIYOORKAVU, THIRUVANANTHAPURAM.

2. CHANDRAN, S/O.LATE APPUKUTTAN NADAR, AGED 49 YEARS, RESIDING AT DO. DO.

3. KUMARI, D/O.LATE APPUKUTTAN NADAR, AGED 46 YEARS, RESIDING AT DO. DO.

4. SIVAN, S/O.LATE APPUKUTTAN NADAR, AGED 45 YEARS, RESIDING AT DO. DO.

5. MANIKANTAN, S/O.LATE APPUKUTTAN NADAR, AGED 38 YEARS, RESIDING AT DO. DO.

6. GEETHA, D/O.LATE APPUKUTTAN NADAR, AGED 34 YEARS, RESIDING AT DO. DO.

BY ADV. SRI.D.GANESH KUMAR

RESPONDENTS:

1. VASANTHA, W/O.LATE VENU, MELEKOTTUVILA PUTHEN VEEDU, ELIPPODE, VATTIYOORKAVU, THIRUVANANTHAPURAM.

2. ARUNKUMAR, S/O.LATE. VENU, RESIDING AT DO. DO.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 08/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.N.KRISHNAN, J.

W.P.(C) No.16969 2007 T

Dated this the 8th day of June, 2007.

JUDGMENT

This writ petition is preferred against the order passed by the II Additional District Judge, Thiruvananthapuram in I.A.No.2269/06 in C.M.A.No.58/06. The defeated defendants in the case are the writ petitioners before me.

2. There was a suit for partition filed as O.S.No.1130/2000. It was with respect to 3 schedules of property viz., A, B and C. The said suit was decreed ex parte and an application for setting aside the ex parte decree was filed. It was dismissed by the court. Then, with a delay of 811 days, a C.M.A was filed to condone the delay and to set aside the order of the trial court. The lower appellate court found that there are no grounds to condone the delay and therefore, dismissed the application.

3. There are 7 defendants in the case. The first defendant is aged 82 years. It is contended that on account of his age, he was not able to conduct the case properly and the previous counsel, with whom the matter had been entrusted,

did not give proper legal advice and he told that they can file a separate suit and ultimately on correct legal advice, they have moved the application for condonation of delay and the C.M.A.

4. At the outset, I may like to state that a man, who is aged 82 years and said to be incapacitated at that stage, cannot suddenly become active at the age of 85 years. So, the age of a person is not a bar in prosecuting the matter. Further, besides him, there are six other able bodied defendants in the case. None of them has moved their little fingers to file the application in time. Then the reason argued is the wrong legal advice given by the counsel. Except the mere argument and the affidavit, there is nothing to show that such an advice has been given. When a person is informed that he may file a separate suit, naturally such person will approach the lawyer to understand whether the suit has been filed or not. These reasons are only stated just to get over the delay and it is not supported by any acceptable cogent and correct evidence. I am fully conscious of the fact that the broad principles of natural justice always demand the court to give the parties an opportunity to

contest the matter on merits.

5. But, at the same time, there is negligence and grave misconduct on the part of the writ petitioners. The powers of the court should not be exercised to defend a defaulting party. It is equally a settled principle that by indiscriminately using the power, winning party should not be placed in the position of the losing party. Except a bald statement in the affidavit, there is nothing to substantiate the reasons alleged for condoning the delay.

Therefore, I find that the appellate court was perfectly justified in dismissing the application for condoning the delay. So, it was rightly dismissed and as a consequence, the C.M.A was also dismissed. I do not find any merit in this writ appeal and it is accordingly dismissed.

Sd/-

(M.N.KRISHNAN)
JUDGE

sk/

//true copy//

P.S. To Judge